IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2007

CORAM

THE HONOURABLE MR. JUSTICE K. RAVIRAJA PANDIAN
AND
THE HONOURABLE MRS JUSTICE CHITRA VENKTARAMAN

WRIT PETITION NO.41299 OF 2002
AND
W.P.M.P.NO.61152 OF 2002

M/s. Bhoomi Bottling Gas Company
Private Limited
rep. by Mr. K.V.P.Bhoominathan
Proprietor
No.648, Anna Salai
Thousand Lights, Madras-6. ... Petitioner

Vs.

1. The Assistant Commissioner
   Commercial Taxes (CT)
   Zone-IV, Madras - 6.

2. The Commercial Tax Officer
   Nungambakkam Assessment Circle
   Spurtank Road, Madras - 31. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari calling for the records in O.P.No.840 of 2002 on the file of the Tamil Nadu Taxation Special Tribunal, Madras and quash the order dated 28.10.2002.

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For Petitioner : Mr. Ramani
for Mr.V.Bhiman

For Respondents : Mr. R. Tholgappian, G.A.

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O R D E R

(Order of the Court was made by
K. Raviraja Pandian, J.)

This writ petition is filed seeking for the issuance of a Writ of Certiorari calling for the records in O.P.No.840 of 2002 on the file of the Tamil Nadu Taxation Special Tribunal, Madras and quash the order dated 28.10.2002.

2. The petitioner filed the O.P. Before the Tamil Nadu Taxation Special Tribunal challenging the order of the Assistant Commissioner of Commercial Taxes, Zone-IV, Madras made in his proceedings No.Rc.1377/A2, dated Nil May, 2002, whereby the Assistant Commissioner cancelled the agreement entered by him on 28.6.1996 with the petitioner for breach of certain covenants contained in the agreement. The correctness of the said order was canvassed before the Taxation Special Tribunal, which rejected the contention and confirmed the order of the Assistant Commissioner by its order dated 28.10.2002. The facts are as follows:-

The writ petitioner is the Proprietor of the company Bhoomi Battling, which carried on the business of purchasing the bulk liquified petroleum gas and stored the gas in its storage point from there it refilled the LPG gas in the cylinders and sold the same to the consumers through dealers appointed by it. The petitioner applied for and obtained an Eligibility Certificate from the District Industries Centre for sales tax deferral not exceeding Rs.75,53,400/- as interest free sales tax for nine years from the month in which the petitioner's unit commenced commercial production i.e. from 23.6.1995 to 22.6.1996. Pursuant to the same, the petitioner entered into an agreement with the territorial Assistant Commissioner, the first respondent herein on 28.6.1996. The agreement provides for various conditions that has to be observed by the petitioner and also provides for repayments schedules. According to the petitioner, the petitioner was carrying on its activity from 2000 onwards till 2002. Subsequently, the Government liberalised policy and LPG was easily available to the public. The business of the petitioner was not lucrative. Hence, stopped the business of purchasing LPG from Reliance Petroleum and refilling it in the cylinders. However, continued the job work for the same purpose, with HPCL, which is also an oil company. In the end of 2002, there was an inspection by the Enforcement Wing Officers of the respondents of the factory premises of the petitioner. During the inspection, it was found that the petitioner has violated condition Nos.5, 7 and 9 of the agreement entered by the petitioner. Based on the inspection, a show cause notice was issued to the petitioner and upon hearing the objection raised by the petitioner, by the order

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dated Nil, May, 2002, the Assistant Commissioner cancelled the agreement entered into for availment of IFST Deferral Scheme.

3. It is contended by Mr. Ramani, learned counsel for the petitioner that the show cause notice contained three violations. One is that the petitioner has not filed the insurance policy for each year as required in Clause 5 of the agreement and the other is that the petitioner has not filed the audited balance sheet for each of the year as per terms and conditions No.6 and the third one is that the petitioner has violated the condition No.9(11), which disentitles the petitioner's unit for the IFST deferral, if stopped normal production for the continuous period of six months. According to the learned counsel appearing for the petitioner, while submitting the objection to the show cause notice, the defects pointed out by the respondents as 1 and 2 that is non production of the insurance policy and the non production of the audited balance sheet has been complied with that has been accepted by the respondents. However, the explanation offered by the petitioner for the third violations has been rejected. The reasoning stated for rejection of the explanation offered is not in accordance with the statutory provision and not in accordance with the agreement. According to Mr.Ramani, learned counsel appearing for the petitioner, the petitioner never stopped production for a continuous period of six months but was carrying on the business operation, of course, a minor deviation in the transaction, in the sense, originally the petitioner has purchased bulk LPG gas from Reliance and it was stored and after refilling in the cylinders sold the same to the general public through distributors. However, from 2002 onwards, he was doing the same activity of refilling the gas in cylinders as a job work to HPCL and hence, the activity of the petitioner cannot be regarded as a violation of condition Nos.9 or 11. On that ground, the order of the Assistant Commissioner is not in accordance with the agreement and the order of the Tribunal confirming the order is also not sustainable. Hence, the order has to be set aside.

4. On the other hand, learned Government Advocate appearing for the respondents submitted that once the petitioner entered into an agreement with the respondent authorities that would tantamount to a concluded contract and any breach or violation has to be dealt with as per the agreed covenant. He further contended that the consequence of breach of agreement has been categorically stated in the agreement. The petitioner having agreed to the conditions contemplated in the agreement and signed the same, cannot now come out and say that the condition contained is otherwise. He further contended that the benefit has been granted to the petitioner for manufacture of taxable goods, the violation alleged is that the petitioner was not manufacturing any taxable goods from 2002 onwards. Hence, the action of the respondents in

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cancelling the agreement entered with the petitioner is strictly in accordance with the covenants contained therein. The confirmation order passed by the Tribunal is also strictly in accordance with law.

5. We heard the learned counsel appearing on either side and perused the materials available on record.

6. The very scheme of the deferral of interest free sales tax as contemplated in G.O.Ms.No.500, Industries (MIG.II) Department, dated 14.5.1990 is very categorical in its terms. In order to resolve the issue in the present case, the relevant clause is required to be reproduced which reads as follows:-

> " The Government in the order second read above declared 105 taluks of this State as Industrially backward for the purpose of grant of Interest Free Sales Tax Loan, Interest Free Sales Tax Deferral, state capital subsidy, etc.
>
> 2. With a view to correct regional imbalances in the industrilisation in the State, by giving further incentives to more backward areas, the Government direct that 30 taluks, from among the 105 industrially backward taluks, be declared as industrially most backward taluks. The names of the 30 taluks are annexed to this order.
>
> 3. The Government direct that the new industries to be set up in the 30 most backward, taluks ordered in para 2 above and also in the three industrial complexes of State Industries Promotion Corporation of Tamil Nadu at Pudukottai Cuddalore and Manamadurai be eligible, apart from other existing concessions, for full waiver of sales tax dues for a period of five years upto a ceiling of the total investment made in fixed assets. Existing industries in the most backward taluks and in the three State Industries promotion Corporation of Tamil Nadu (SIPCOT) Complexes, undertaking expansion/diversification are also eligible for full waiver of sales tax dues for period of five years subject to a ceiling of the total investment made in fixed assets under expansion/diversification.
>
> 4. With view to encourage more industries in Tamil Nadu, the Government direct that the following concession also be made available to the industries.
>
> a) For the industries to be started in the 75 backward taluks, i.e., other than the 30 most backward taluks, from among the 105 backward taluks, and in the industrial estates developed by any of the Government agencies including Madras Export

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Processing Zone, Madras Metropolitan Development Authority, the scheme of Interest Free Sales Tax Loan/deferral ordered in the Government order first, third and fourth read above is modified as follows:

i) For the existing units undertaking expansion or diversification, deferral of sales tax will be given for nine years and the total amount thus given shall not exceed 80% of the additional investment made in fixed assets.

ii) For the new units, the total amount of deferral of sales tax will be given for nine years to the full extent of the total investment made in fixed assets.

b) The interest Free Sales Tax deferral scheme is extended to the expansion(Part-I) as well as to the starting of new industries (part-II). In other areas also where this scheme was not in vogue hitherto, the deferral of sales tax for the industries in these areas will be for five years, subject to a maximum of 60% of the total investment made in fixed assets in the case of new investment and 50% of the additional investment in fixed assets made in the case of expansion/diversification of the existing industries.

c) As a gesture to the industries to be set up in any part of Tamil Nadu with an investment in fixed assets of more than Rs.50 crores, a special incentive of deferral of sales tax for a period of 9 years to the extent of total investment made in fixed assets will be given. This deferral concession will also be available to the existing industries going in for expansion/diversification with an additional investment in fixed assets of more than Rs.50 crores.

5) The sales tax deferral/waiver of expansion/diversification ordered in paras 3, 4 above is subject to the sales tax payable on products manufactured by the capacity created by expansion/diversification units only."

7. On the reading of the above clause, it is very clear that the sales tax deferral or wavier was granted subject to the sales tax payable on the products manufactured by the capacity created by expansion/diversification units only. Having its idealogy on background, if we consider the case of the petitioner, it is clear that the petitioner was granted a deferral scheme benefit for nine years on the sales tax payable by it on the sale of the goods handled by the petitioner. It is an admitted case, from 2002 onwards, there is no tax liability on the petitioner as he has switched over his activity of the refilling and sale of LPG gas through dealers to job work for HPCL only. So, the very

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activity of the petitioner is not earning any sales tax to the revenue. When there is no earning on the part of the petitioner in the form of sales tax revenue, there is no deferral of sales tax which arise for consideration. Hence, the switching over of the activity in which no sales tax revenue involved i.e. job work of refilling of LPG can definitely be regarded as violation of the agreement entered into between the respondents and the petitioner.

8. Learned counsel appearing for the petitioner has argued making reliance on the judgment of the Taxation Special Tribunal reported in the case of GHOUSEIYA GRAM FLOUR MILLS VS. DEPUTY COMMERCIAL TAX OFFICER, KRISHNAGIRI AND OTHERS reported in 101 STC 149. The facts of the above case is not similar to the facts of the present case, in the sense that the activity was continuously going on in the sense that instead of gram dhall flour maize flour has been manufactured by the petitioner therein. In that case, the scheme of interest free deferral has not been taken into consideration for resolution of the dispute therein but mere the covenant contained in the agreement has been taken into consideration and held that the covenant has not stated that there should be a manufacturing activity. Hence, the above decision is not applicable to the facts of the present case particularly when the scheme as extracted above required the activity of the petitioner to generate the sales tax, then only they are entitled to get the deferral or waiver of the sales tax that is postponement of the sales tax for a later period.

9. The counsel also relied on the decision of the Supreme Court in COMMERCIAL TAXES OFFICER, JODHPUR VS. VISHNU METALS reported in 146 STC 634. We are of the view that the above case is also not advancing the case of the petitioner as that was held in a different context. In that case, under the Sales Tax Incentive Scheme for Industries, 1989 issued under Section 4(2) of the Rajasthan Sales Tax Act, 1954, exemption was granted from sales tax on the expansion of sales within the State of goods manufactured by industrial units. Clause 2(f) of the Scheme defined "expansion" as increase in value of fixed capital investment of the existing project and accompanied by an increase in the production to the extent of at least 25 per cent of the original licensed/registered capacity. In those situations of the case, the Supreme Court held that the increase in production contemplated by the Scheme would include also production by the assessee of goods for others on job work provided that those goods were of the same nature as of those produced by the assessee for sale. The Supreme Court further held that it was not proper to proceed only on assumption in the absence of material to indicate the nature of the job work undertaken by the assessee. It is evident from the above for the purpose of increasing the value as required under the Scheme, the job work done by the assessee was directed to be taken into consideration.

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That is not the issue in this case. Hence, the reliance of the judgment cannot advance the case of the petitioner any further.

10. Learned Government Advocate appearing for the respondents argued on the basis of the reasoning required in the decision of the Special Tribunal in PREMIER POLY SACKS (P) LTD., VS. ASSISTANT COMMISSIONER (CT) AND ANOTHER reported in 125 STC430. The facts of the case is also not identical as in the present case. However, reference has been made to the Government Order in G.O.Ms.No.500, Industries, dated 24.5.1990 with which we relied in this case. Apart from mere reliance of the Government Order, the Tribunal has not considered the significance of the Government Order. We are of the view that decision also no way helpful for deciding the issue. We have already come to the conclusion that the deferral granted is nothing but postponing the payment of sales tax liable to be paid for the current period to a future period. Unless the petitioner generating the sales tax for the current period, the petitioner is not entitled to have tax benefit under the IFST deferral. Hence, we do not find any illegality or irregularity in the order passed by the Tamil Nadu Taxation Special Tribunal. Accordingly, the writ petition fails and the same is dismissed. Consequently, connected miscellaneous petition is also dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Assistant Commissioner
   Commercial Taxes (CT)
   Zone-IV, Madras - 6.

2. The Commercial Tax Officer
   Nungambakkam Assessment Circle
   Spurtank Road, Madras - 31.

1 cc to Mr.V. Bhiman, Advocate, Sr. 55962

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